Supreme Court, U.S.
FILED
03-562 OCT 9 2003
OFFICE OF THE CLERK

No. 03-

IN THE

Supreme Court of the United States

MERANIA MURINGU MACHARIA, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PHILIP M. MUSOLINO
MUSOLINO & DESSEL
1615 L Street, N.W.
Suite 440
Washington, D.C. 20036
(202) 466-3883

Counsel for Petitioners

183433

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

142 11

QUESTIONS PRESENTED

1. Whether, under the Federal Tort Claims Act ("FTCA"), individual acts of garden variety venal negligence are now always discretionary, and thus immunized, merely because they can be bundled together and treated generally as negligence relating to "Security."

2. Whether the FTCA's foreign country exception protects the United States from a security contractor's negligence, which resulted in the deaths of hundreds and the injuries of thousands of Kenyans at the US Embassy in Nairobi, Kenya.

3. Whether the unjustified confinement and the disparate treatment of Kenyans following the attack on the US Embassy by Usama bin Laden and *al Qaeda* were insufficiently prolonged, and insufficiently systematic, as a matter of law, to warrant relief under the International Convention on Civil and Political Rights.

LIST OF PARTIES

The following parties appeared below as appellants and appear in this Court as petitioners:

Merania Muringu Macharia Personal Representative Of Agatha Ann Njoki (Deceased), Gladys Mumbi Mwangi Personal Representative Of Roselyn Wanjiky Mwangi (Deceased), Geoffrey Njau Gichia Personal Representative Of Jacinta Njoki Njau (Deceased), Matthews Onyango Personal Representative Of Jennifer Atieno Onyango (Deceased), Noah Thuo Kimani Personal Representative Of Felista Njeri Thuo (Deceased), Loise Njeri Nganga Personal Representative Of Elizabeth Wanjiku Ng'ang'a (Deceased), Alice Muthoni Kamua Personal Representative Of Joseph Kamau Kiongo (Deceased), Janet Waruguru Kibaki Personal Representative Of Simon Mwangi Njima (Deceased), Pamela Alouch Osweta Personal Representative Of Monica Apondi Anyango (Deceased), Margaret Achieng Jow Personal Representative Of Doreen Alouch Jow (Deceased), Jane K. Naivasha Personal Representative Of Abel Mutegi (Deceased), Mary Muthoni Ndungu Personal Representative Of Francis Ndungu Mbugua (Deceased), Opportune Mogo (Deceased), Mirian Oriendo Personal Representative Of Sylvia Edna Ambasa (Deceased), Serah Andenyi Malaki, Personal Representative Of Frederick Ezra Ochieng (Deceased), Macleod Wayama Anyanzwa Personal Representative Of Catherine Muketi Ibere Weyamas (Deceased), Mustafa Aban Hashi Personal Representative Of Burhan Aden Hashi (Deceased), Mohamed Hukay Guracha, Representative Of Hassan Hukay Guracha, Dillia Mutaka Mwani, Representative Of Moses Ashton Mwani (Deceased), Lucy Wangari Gachagwi, Jeniffer Mwongeli Mulili, Emmanuel Kioko Muema, Hedwig Yohanine Kibukosya, Rosemary Njeri Miringu, Patrick Kizengwa Kilaya, Bernard Gituto Maina, Alexander Manyeago Shiakwila, Beatrice Atieno Omiti, Pauline Wambui Njihia, Gardy Nyadero Onguru, Bruno Kinyua Nicasio, Mohamed Kanya Mwangi, Jackson Munala, Evans Mukunga Muita, Douglas Kairu Muriithi, Harakhchand P.

Sumaria, Jatin H. Sumaria, Alex Okoth Ondewe, Daudi Wambua Kisivo, Lwitiko Henry Yoram, Jane Koli Kisule, Jane Muthoni Kiarie, Margaret Musoke Wagabi, Joyce Mumbi Muasyakituku, Fidelis Masyula Ndambuki, Irene Njoki Wainaina, John Kichuma Imbahale, Victoria Kanuku Mutuku, Juliet Wangina Njuguna, Joyce Wanjiku Kibigo, Charles Maina Banga, Muita & Company, Ltd, Capital Guardians Association, Samson M. Kaindi, Joseph Gathere Gitau, Caleb Bondi Atieno, T/A Yala Hair & Beauty Parlour, Charity Wangui Madancia, Karen Muthoni Muchina, And Moses Kariuki Ruita, Pascal Odhiambo Akoko, Patricia Wanjiru, Peter Waweru, Muchiri, Phoebe Atieno Nyadera, Robert There Kabiru, Rose Mbithe John, Sophia Wanjiru Waweru, Lenard Wanda Obimbira, Mary Wangui Waithaka, Mohamed Taabu Onyango, Mugo Muriithi, Jennifer Igwili Lugaye, John Gacheru Muchunu, John Ndumbu, John Owich Otiende, Joseph Huho Kamau, Josephat Nganga Karuiki, Judy Wamuyu Kibera, Isaya Amwayi, Janice Gatwiri Muthuri, Jared Obondo Thuma, Jeddidah Khaluh Amelemba, Danish Odhiambo Kiboye, Dauphin Okwama Kisaka, Eliud Nguhiu Muritu, Felista Wangari Ithagu, Felix Charles Mwangi Wachira, Francis Wangi Kihohia, Simon Mbithi Mwami, Stanley Ngigi Gitau, Stephen Kairu Maina, Thomas Zedekiah Keya, Timothy Kamau Thuo, Tom Irondi Matundura, Dominic Mwanja Personal Representative Of Wycliff Okoth (Minor), Zalwango Eulalia Kawagga. Daniel Ngang'a Kinuthi, Roselyne Atieno, Rosemary Mwavizo, Rufus

Kinyanjui Chiera,Salim Nondi Sewe, Salim Yakub, Samuel Gitau Munene, Samuel Murage Muriuki, Samuel Sikuku Kabala, Ratemo Okomo, Richard Maina, Robert Onyango Achieng, Robin Njoroge Njeri, Rose Njoki Gitau, Pamela Achieng Odhek, Paul Kaluku Lima, Penina Muraa Ogutu, Peter Gachago Kahuthu, Peter Karanja Kamua, Peter Maina Ngure, Peter Nzangi Mwanzia, Philip Njoroge Mwaura, Rashid Harun Ally, Mike Obonyo Guoro, Monicah A. Lanho, Moses Kariuki Njugi, Muange Juma Musembi, Mustaq E. Kapacee, Nancy Andega Matero, Nicholas Musau Matata, Nicodemus Nyaboga, Obadiah Maina Ndegwa,

Oloo Benson Omello, Loise Wambui Kimani, Margaret Nyaguthi Mwangi, Mary Loko Muthike, Mary W. Waiyaki, Mary Wamuyu Kabiriri, Meresa Atieno, Meshack Lubembe Chedo, Michael K. Kaharu, Kennedy Sayia Musa, Leonard Chuna Njuguna, Lilian Jepkoech Kibet, Livingston Mugo Knothe, Julius Mwangi Kabaiku, Julius Muema Kisilu, Julius Thuku Mwangi, Justus Kimathi Mitili,Kennedy Njeri Kiringa, Johnson Maina Mwangi, Joseph Kiarie Kabii, Joseph T. Karuri, Joseph Swan Oyungu, Joshua Lucas Omolo Opundo, Joshua Olouch Obulo, Jane Achieng Okwama, James Owuour Olouch, John Nzioki Umbe, josphat Gikonyo Ruiru, Hudson Agade, Joan Nekesa Barasa, Jane Wambui Mokoosio, Joseph Obuya Okoth, James Kamugeka Kamua, Judith Shimuli Mbeta, Josphat Mutundu Kivau, Josephine Atieno, Josphat Githua Gathara, Joseph Waruiru Kariuki, Irene Mwamburi, Protus Manyasa Buluma, Jackson Kilungya Kimunduu, Jackson Mwai Kariuki, James Wasinyo Musamali,George Mike Muniu. Grace Ndinda Luti, Haron Gatiji Muriuki, Harrison Muja Eyinda, Francis Maina Mugo, Fridah Kirimi Muthuri, Ephantus Nganga Mburu, Ernest Muchene Ng'ang'a, Eunice Chepkemoi, Duncan F. Were Barasa, Elijah Menywa Kivuli, Duncan Ndwiga Nelson, Dan Asiema Mole, David Kimuchu Muturi, Elijah Njagi Ireri, Jacinta Wanjiru Ngure, Helen Penina Ooko, George Ngesa, Obura & Company Advocate, C/O Geoffrey A. Orao - Obura, George Owino Omollo, Gabriel Andati Ndugu, Gathigi Njoroge, Elphas A. Wangoka, John Ibrahim Wamenjuu, Jacob O. Odipo, Dr. Phanuel B. O. Odhiambo, Claris Juma Oyola, Cyrus Wachira Wahome, Frida K. Odera, Charity Wangari, Gaitho, Christine Nduku Koli, Christine Tumaini Masha, Anne Njeri Karinga, Anne Wambui Kinyanjui, Augustine Masiga Musicha, Ambrose Mbanga Maina, Anderson Wagichia Komu, Alice Nyaguthi Macharia, Alice Wayua Makau, Alice Wanjiku Mbugua, Agnes Muthoni Kambo, Alfred Kavogoyi, Susan Wairimu Kimemia, Thomas Ombonyo S. Mongare, Patrick Wanjala Barasa, Phillip Kaniaru Gitahi, Roby Mauka, Mary Wamweru Mburu, Caroline Achieng Ombewa, Charles Ogwori, Boaz Shivachi, Boniface Kyalo Ndima, Betty C.

Ngososei, Azaria Awino Ogonda, Beatrice Wamaita, Benjamin Murunga Wanyonyi, Andrew Papai, Ambrose Okello Oguttu, Ambrose K. Ruto, Alfred E. Omole, Geoff Orao - Obura, Absolom Opondo, Victor Ambrose Oduma,Silas Wachira, Simeon Otieno, Simeon Otieno Oyugi, Peter Mburu Waruhiu, Johnson Ouma Oilil, Julius M. M. Nguku, Loise Wambui Njiriri, Jacob Opiyo Ogwang', Hellen Achieng Ongola, Gabriel Ngure Thamaine, Filista Awino Ochieng, Francis Ndungu Njenga, Ben Olouch Pepe, Beatrice Adhiambo Okech, Lillian Nyamnbura Mwangi, Lucy Wanjiru Muguma, Margaret Njoki Iraya, Marion Wairumu Muriithi, John Githaga Chege, Hudson Ngusale Anyango, John Mburu Kibunja, Jackline Ambia, Fredah Auma Afande, Fedlam Maamu Mwamburi, Elizabeth Muthoni Wanjoike, Dr. George Munene Mugambi, David Maina Kabugi, Daniel Kuria Mwangi, Cosmas Kangori Nkonge, Catherine Nechesa Abuko, Boniface Nzeki Makau, Anne Wanjiru Murethi, Anne Nyokabi Gachaara, Miriam Mohammed Adan, Alex Murithi Kamundi, Charles Makoni Mogi, Café D'elegance C/O Peter Mburum Waruhiu, Grasy Photo Designers C/O Jackim Oyuda Arondo, Lazarus Kipikembi, Lagoma Laboratory & General Supplies C/O John Owich Otiende, Kagen Consult, Kenda Fish And Chips C/O Christine M. Kahigu, Josephine Kathoma, Joe Kiroga, Jennifer Njeri Mwangi, Jane Wanjiku Kamua, Wama Bureau Services, Wakima Enterprises C/O Robert Kimama Kuria, Top Notch Saloon C/O Milianah Adhimbo Msugagi, Dr. David Gilbert Ombati, Uganda Railways Corporation C/O Zalwango Eulalia Kawagga, Vasanji Gokaldas & Sons C/O M.R. Kanabar, Stimal Office

Supplies C/O Stanlous M. Alogongo, Chrispin Waweru Nganga, Princes Hotel C/O Christine M. Kahigu, Gilfreight Cargo Services Limited C/O G.M.T. Ottieno, Gatome & Associates,

Generation Saloon C/O Ruth Njeri Gichuhi, Eva's Café C/O Justus Gituma Muguna, Egerton University C/O Joseph Obuya Okoth, East Graphics Agencies C/O Michael K. Kaharu, Brazen Computer Agencies, Bekago Auctioneers C/O Joseph Daniel Kimani Kagombe, Amee Exim Ltd C/O

Moses Njuguna Khanda, Agdeco Savings & Credit Cooperative Society Ltd., Afya Chemicals & Pharmaceutical Ltd. C/O Joseph Muhiu Miano, Sara Njoki Maina, Monks Medicare Africa Ltd., Muyoti & Associates, Ltd. C/O Fred Babs Muyoti, Dona Snacks, Charles Waro, Abbas Kiosk C/O Mohamed Kassam A. Amdul Rehman, Romeo Security Services, Choice Ads Ltd. C/O Dr. Delano A. O. Othieno, Mbanjo Printers & Stationers C/O Jackson W. Kirima, Nationwide Marketing Service C/O Nzioka Musyoki Ngomo, Kenya Executive College C/O Paul Ngao Matheka, Halifax Insurance Services C/O Thomas Kimani Kamau, Generation Tailoring C/O Damaris W. Waithaka, Atlanta Youth Bureau Services, Nafos Merchas Ltd C/O Mbuthia W.A. Gachua, Music World (K) Ltd. C/O John Njagi Karionji, Moi University (Nairobi Office) C/O Joseph Muindi, Milka Wangui Kariuki, Mary Wanjiku Kinuthia, Margitons Ltd, C/O Martin Gitonga Mutungi, John T. Mwangi C/O Financial Analytic, Frederick Magita C/O Financial Analytic, Francis Mburu Nudungu C/O Financial Analytic, Adequate Advertising Ltd C/O John Kimathi Nyaga, Chic Hair Saloon C/O Grace Wairimu Paul, Francis Haggai Odour, Judy Wanjiku Kamau, Margaret Celestinah Akello, Richard Kipkoech Koskei, Johnson Owour Atieno, James Njoroge Kiarie, Jane Wangui Gichuki, Ezekiel Kiunga Mwirichia, James Muthike Komu, Beatric Wanjiru Mungara, Anderson Wagichia Komu, Francis Githinji Ngatia Personal Representative Of Cosmas Ngati Githinji (Minor), Purity Mumbi Kibuchi, Moses Karari Kinyanjui, Kinyua Kamathi, Stephen Kimani Mwangi, Christina Murumet, John Kiberas Murumet, Lucy Mary Mambo, Thomas Shiraku Akama, Mary Wanjiru Kingori, Amos Seme, Maroro, Edward Mbabu Mbogori, Andrew Maithya Kitili, Eunice Wanjiru Muraya, Grace Wairimu Muraya, William Musyoki Muia, Agnes Wamuyu Githinji, Lucy Njeri Maingi, Samuel Kibunja Kamua, Frida Namenge Odaya, Laurance Okuto Osemo, Julie Stella Ogoye, Benjamin Okwiri Oyugi, Ng'emo Thomas, Ephraim Wainaina Wanyoike, John Okango Okango, Theresa Nafula Ombisa, Paulo John Weru Ngiri, Isaya Omolo, George Ngige S. Njoroge, Adrian Muriithi

Muanyeriah, John Wambua Malila, Charles Kamweti Murithi, Richard Ndekere Maina, Joseph Wanyeki, Anastacia Grace Wanjiku, Pipes Restaurant & Spiders Pub, Gastone Riziki Yongo, Kim Video Production C/O John Kimani Nganga, Seska Freight Agencies, Syfran General Contractors, Francis Githinji Ngatia, Msasa Gardens Limited C/O Beatrice Mutitu Mbogori Chabenda, Esda Saloon C/O Ruth Wairimu Wang Ombe, Coffee Systems Consult C/O Madrine Wangiri Rugano, Megatex Creations C/O Madrine Wangiri Rugano, Agnes Kuthi, James Kenneth Mugo, Julius Kalili Kithikii, Mary Nyambura Gaita, Muniu Gichongo Natera, Lypatons Investments C/O Janue Magure, Lucyline Gatune Mundi, Express Bar & Restaurant C/O Francis Kimene Chege, New Thimbigua Provision Store C/O James Njoroge Chege, Magomano Restaurant & Bar C/O David Njenga Mwangi, Propensity Properties & Consultants C/O Francis Ben Njuguna & Nancy Njeri, New Kiiri-Ini Night Club C/O James Gaichuru Mwangi, Divine Beautyland Salon C/O Margaret Njeri Kariuki Kibui, Midtown Computer Systems C/O Kenneth Kimiti Kamunge, Francis Ngei Mutua, Grace Njeri Maina, Gerald Stephen Mwani Muganga, Julia Kanugu Majau, Ann Wanjugu Ndegwa, Stephen Njenga Githitu, James Kuria Gichiru, Francis Nyamu Gathito, Joseph Gikonyo Kiruthi, Alice Nyaguthi Kabuchu, Alice Njeri Mwaniki, Apriano Njue Ireri, Gachigo Patrick Mwaniki, Janeffer Muthoni Chege, Stephen Irumbi Kuria, Nancy Njeri Karugu, Francis Kibi Macara, Francis Kariuki Mwangi, Francis Waiganjo Mwaniki, Mercy Wairimu Mwaniki, Emily Njeri Macharia, Josphat Kambi Mwangi, James Gichimu Karuiru, Agnes Njeri Kariuki, Martin Wambua Muvevi, Peter Agoi Isawa, Stanley Kamau Gaicuru, Elisaphan N. Wamenju, Winfred Njura Njeru, Winfred Njeri, Lucy Wairimu, Charles Githaiga Nguku, Judy Mutitu Nyaga, Rose Akoth Onyango, John Ndirangu Wahome, Gidraph Gikonyo Ngumba, Stephen Kimeu Musombo, Masalleno Ireri Kithaka, Joyce Wanjiru Muraguri, Aggrey Adeka Kalwala, Josephat Kagwanja Mwaniki, Cicilio Nthiga Kenyatta, Phapas Njiro Kiuria, Francis Kimere Chege, Rose Nzula Mwinduko, Julius

Gikonyo Kimani, David Waithagi, Alex Kamau Wakaba, Lucy Lenny Kisia, Fortunatus W. Ndgewa, Priscilla Ambalo Athanas, Rachel Ames Amolo, Harriet Mgazo Mwaighcho, Jane Tsivove Mwale, Gladys Wangui Nderitu, Peggy Felicity Aloo, Mbai & Kibuthu Advocates.

No appellant has a parent corporation, and no publicly-held company owns 10% or more of the stock of any appellant. These representations are made, *inter alia*, so that judges of this court may evaluate possible disqualification or recusal.

The following party appeared below as appellee, and will appear in this Court as respondent:

The United States of America.

No other parties appeared below or have entered an appearance in this Court. No *amici* appeared below or have entered an appearance in this Court.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No petitioner is owned or held in whole or in part by a parent corporation. No publicly held corporation owns 10% or more of the stock of any petitioner.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Rule 29.6 Corporate Disclosure Statement	viii
Table of Contents	ix
Table of Cited Authorities	xiii
Table of Appendices	xix
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	1
Facts	1
A. The Bureau of Diplomatic Security, At its United States Headquarters, Was Responsible for Physical Security at the Embassy	2
B. From No Later Than December 1997 Through August 7, 1998, Employees at DS Ignored Their Non-Discretionary Obligations to the Post, and Delayed Fulfilling Those Obligations	4
Proceedings Below	8

Contents

	Page
Reasons for Granting the Petition	9
I. The Circuit Court's Expansion of the Discretionary Function Exception In Cases Involving "Security" Is in Principled Conflict With Other Circuits, and Misconstrues the Decisions of this Court in a Case of Substantial Intrinsic, National and International Consequence	9
A. The Circuit Court's Expansion of the Discretionary Function Exception In Cases Involving Security Conflicts With Other Circuits And Misconstrues the Decisions of this Court	9
1. The Circuit Court's Methodology Does Not Comport With This Court's Treatment of the Discretionary Function Exception and Creates An Unjustified Analytical Bias Against FTCA Claimants	10
2. The Circuit Court's Blanket Immunization of Conduct Invoking "Security" Exceeds the Language of the Statute	17
3. The Circuit Court's Categories Have Either Been Treated By other Circuits As Outside the Protection of the Discretionary Function Exception Or They Lack Any Characteristics Which Have Previously Been Accorded Discretionary Function Protection	19

Contents

		Page
	B. The Disposition of the Claims In This Case Is of Substantial Intrinsic, National and International Consequence	22
II.	The Circuit Court's Misapplication of the Foreign Country Exception Is in Principled Conflict With Other Circuits, and Misconstrues the Law In a Case of Substantial Intrinsic, National and International Consequence	23
III.	The Circuit Court's Residuary Affirmance of the Trial Court's Erroneous Construction of the Principles of "Prolonged Detention" and "Systematic Discrimination" Under Fed. R. Civ. P 12(b)(6) Is in Principled Conflict With Other Circuits, and Misconstrues the Decisions of this Court In a Case of Substantial Intrinsic, National and International Consequence	26
	A. The Circuit Court's Disposition of the Claims of "Prolonged Detention" Misconstrues This Court's Treatment of that Issue In Principles and Conflicts With Decisions In Other Circuits	28
	B. Assertions of "Prolonged Detention" Are Recurring And Important Issues in Current Federal Litigation	28
	C. The Circuit Court's Disposition of the Claims of "Systematic Discrimination" Conflicts With Decisions In Other Circuits	29

Contents

		Page
D.	Assertions of "Systematic Discrimination" Are Recurring And Important Issues in Current Federal Litigation	30
Conclusion		30

TABLE OF CITED AUTHORITIES

Cases: *Page*

Alvarez-Machain v. United States, 266 F.3d 1045 (9th Cir. 2001) 28

Andrulonis v. United States, 924 F.2d 1210 (2d Cir. 1991), *vacated*, 502 U.S. 801 (1991), *previous decision reinstated*, 952 F.2d 652 (2d Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992) 21

ARA Leisure Services v. United States, 831 F.2d 193 (9th Cir. 1987) 21

Batra v. Board of Regents of University of University of Nebraska, 79 F.3d 717 (8th Cir. 1996) 29

Beattie v. United States, 244 U.S. App. D.C. 70, 756 F.2d 91 (1984) 24

Berkovitz v. United States, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988) 9, 12, 13, 14, 17, 18

Cestonaro v. United States, 211F.3d 749 (3d Cir. 2000) 21

Cherington v. Skeeter, 2003 WL 22187734 (6th Cir. 2003) 28

Committee of US Citizens Living in Nicaragua v. Reagan, 859 F.2d (D.C. Cir. 1988) 27

Couzado v. United States, 105 F.3d 1389 (11th Cir. 1997) 20, 24

Dalehite v. United States, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) 12, 13, 14, 17, 18

Cited Authorities

	Page
Desi's Pizza Inc. v. City of Wilkes-Barre, 321 F.3d 411 (3d Cir. 2003)	30
Dube v. Pittsburgh Corning, 870 F.3d 790 (1st Cir. 1989)	21
Ferez v. *United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950)	10
Filartiga v. Pena-Irala, 630 F.ed876 (2d Cir. 1980)	27
Huguley v. General Motors Corp., 52 F.3d 1364 (6th Cir. 1995)	29
Indian Towing Co. v. United States, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955)	12, 13, 14, 16, 18
Isaac Kabengi Ndambiri, et al. v. United States, et al., 09CV3086	8
Kim Ho Ma v. Ashcroft, 257 F.3d 1095 (9th Cir. 2001)	27
Logue v. United States, 412 U.S. 521, 93 S. Ct. 2215, 37 L. Ed. 2d 121 (1973)	24
Marlys Bear Medicine v. United States, 241 F.3d 1208 (9th Cir. 2001)	20
McKay v. United States Department of Transportation, 340 F.3d 695 (8th Cir. 2003)	30
McNamara v. United States, 199 F. Supp. 879 (D.D.C. 1961)	11

Cited Authorities

	Page
Nurse v. United States, 229 F.3d 996 (9th Cir. 2000)	20, 24
Odilla Mutaka Mwani, et al. v. United States, et al., 99CV125	8
Pennsylvania v. Bruder, 488 U.S. 9, 109 S. Ct. 205 (1988)	28
Pikel v. Garrett, 55 Fed. Appx. 29 (3d Cir. 2002)	29
Princz v. Federal Republic of Germany, 26 F.3d 11116 (D.D. Cir. 1974)	27
Rayonier, Inc. v United States, 352 U.S. 315, 77 S. Ct. 374, 1 L. Ed. 2d 354 (1957)	11, 19
Rosemary Wanjiru Bichage, et al. v. United States, 00CV1636	8
Summers v. United States, 905 F.3d 1212 (9th Cir. 1990)	21
United States v. Brigham, 343 F.3d 490 (5th Cir. 2002)	29
United States v. Gaubert, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991)	9, 11, 12, 13, 14, 16, 17
United States v. Marino, 277 F.3d 11 (1st Cir. 2003)	30
United States v. Montoya de Hernandez, 473 U.S. 531, 105 S. Ct. 3304 (1985)	28
United States v. Orleans, 425 U.S. 807, 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976)	24

Cited Authorities

	Page
United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984)	12, 13, 14, 17, 18
United States v. Vite Espinoza, 342 F.3d 462 (6th Cir. 2003)	29
Williams v. Kaufman County, 2003 WL21962582 (5th Cir. 2003)	29
Statutes:	
Federal Tort Claims Act, 28 U.S.C. §§ 2671, *et seq.*	1
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291	1
28 U.S.C. § 1346	1
28 U.S.C. § 1350	1
28 U.S.C. § 2671	1, 24
28 U.S.C. § 2674	1, 10, 14
28 U.S.C. § 2680	1, 10
28 U.S.C. § 2680(a)	8
28 U.S.C. § 2680(k)	8
42 U.S.C. § 1983	29

Cited Authorities

Page

Rules:

Fed. R. Civ. P. 12(b)(1) 8

Fed. R. Civ. P. 12(b)(6) 8, 26, 28

Other Authorities:

International Covenant On Civil Political Rights, ratified 138 Cong. Rec. S4781-84 (Apr. 2, 1992) ... 27

Away from Justice and Fairness: The Foreign Country exception to the Federal Tort Claims Act, 22 Loy. L.A. L.R. 603 (Sprint 1989) 24

Charles A. Wright, et al., *13B Federal Practice and Procedure* § 3585 (1988 ed.) 27

Fishback, DS and Killefer, G, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 Idaho L.R. 291 (1989) 12

Peterson, BA and Van Der Weide, ME, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 Notre Dame L.R. 447 (1997) 12, 18

Restatement (3d) of Foreign Relations Law § 102 (1986) 27

Restatement (3d) of Foreign Relations Law § 111 (1986) 27

Restatement (3d) of Foreign Relations Law § 702(e) 27

Cited Authorities

Page

Seamon, R.H., *Causation and the Discretionary Function Exceptions to the Federal Tort Claims Act*, 30 UC Davis LR 691 (1997) 11, 17

Shafer, RP, *Liability of the United States for Failure to Warn of Danger or Hazard Resulting From Government Act or Omission As Affected By "Discretionary Function or Duty: Exception to Federal Tort Claims Act* 28 U.S.C.A. § 2680(a), 65 ALR Fed. 358 21

Steiner, HJ and Alston, P. *International Human Rights in Context* (Clarendon Press, Oxford 1996) 27

The (Kenyan) Lawyer (April 1999) 22

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The District Of Columbia Circuit Dated July 11, 2003 ..... 1a

Appendix B — Order Granting Motion To Dismiss And Accompanying Memorandum Of The United States District Court For The District Of Columbia Entered July 30, 2002 ..... 16a

Appendix C — Relevant Statutes And Conventions 48a

OPINIONS BELOW

Final judgment was entered by the United States District Court for the District of Columbia on July 30, 2002. It is reported at 238 F. Supp. 2d 13. It is reproduced at, Appendix 16a-47a.

Appellants noted their appeal to The United States Court of Appeals for the District of Columbia Circuit on August 2, 2002. The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on July 11, 2003. The opinion is reported at 334 F.3d 61. It is reproduced at Appendix, 1a-15a.

STATEMENT OF JURISDICTION

The action was brought pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, and pursuant to principles of international law. The trial court had subject matter jurisdiction pursuant to 28 U.S.C. § 1346 and pursuant to 28 U.S.C. § 1350.

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The FTCA claims and defenses were based on 28 U.S.C. §§ 2671, 2674, and 2680. The relevant portions of 28 U.S.C. §§ 2671, 2674 and 2680 are reproduced at Appendix C.

Plaintiffs' international law claims referred, *inter alia*, to the International Covenant On Civil Political Rights ("ICCPR"). The ICCPR is reproduced at Appendix, 56a-91a.

STATEMENT OF THE CASE

Facts:

On August 7, 1998, a massive truck bomb exploded at the rear parking lot entrance to the United States Embassy in Nairobi, Kenya. The explosion killed hundreds, and injured thousands.

The Department of State ("DOS") conceded that "[w]ith these two posts[1] the Department gambled and lost." Without referring to the enormous losses sustained by the Kenyan Petitioners, DOS acknowledged that "[a]nytime you lose a

1. Nairobi, Kenya and Dar Es Salaam, Tanzania.

dozen Americans and over 30 local national employees to a terrorist bombing, at some level, you must call that a failure."

That failure was not at the discretionary level. Rather, it was the result of garden variety, mundane, yet critical neglect by headquarters employees, and by a security contractor employed and supervised by the United States.

As United States Ambassador to Kenya Prudence Bushnell later wrote:

> If the issue is *some bureaucrats second-guessing us, from the security of Washington*, about the nature of the threat, let me be blunt. Last year, when this mission raised the vulnerability of the previous embassy building, we received informal feedback that *'some' in Washington thought we were 'overreacting.'* The death of 44 American employees and some 200 Kenyans, and the wounding of 5000 people in Kenya alone, should have made clear to all the threat is all too real. (emphasis added)

A. The Bureau of Diplomatic Security, At its United States Headquarters, Was Responsible for Physical Security at the Embassy

"Physical security" is defined as "[t]hose measures necessary to protect the facility against the effects of unauthorized access, theft, fire, sabotage, loss, or other intentional crime or damage." The Bureau of Diplomatic Security (DS) in the Department of State is responsible for establishing and promulgating physical security standards, policies and procedures. DS is further responsible for ensuring that these standards, policies and procedures are incorporated into the appropriate guidance documents issued by other in the Foreign Affairs Community. DS is based in the United States. ("Headquarters" or "DS") Its main office is in the District of Columbia.

Headquarters issues the applicable standards for the physical security of the United States facilities overseas. Headquarters is responsible for communicating to each overseas facility changes in standards. All physical security upgrades must conform with Headquarters standards and must be specifically approved at Headquarters.

Most security-related equipment must be obtained through Headquarters.

Headquarters is responsible for the DOS technical security program, and the DOS security equipment program. Headquarters is also responsible for review of and modifications to each Post's Emergency Action Plan ("EAP"), and the implementing EAP Handbook.

Headquarters advised each of the Posts that: "Requests for expertise, equipment or personnel in the security field should be made to ..." Headquarters.

Headquarters conducts physical security reviews, and is ".... proactive ..." in its review of security at overseas facilities. By contrast, the RSO at Post typically lacks the expertise to address physical security upgrades. The RSO is also unlikely to implement physical security upgrades on his or her own. Headquarters does not encourage RSOs to use their own initiative with regard to physical security.

Headquarters is required to provide guidance in the field to RSOs with respect to vulnerabilities, and to conduct a survey, devise solutions, or "vet" a proposed solution. Headquarters must apply its own standards, and upgrades are subject to approval by a number of people at Headquarters. These procedures apply with regard to vehicle barriers, and to related upgrades, such as the simple installation of fixed barriers.

Prior to a security survey at a Post, the Headquarters team is required to review earlier records and recommendations. Those reports are likely to be at Headquarters, rather than at Post. During and subsequent to the survey, Headquarters is required to prepare and disseminate a comprehensive report.

The DS standard operating procedure for responding to security concerns required a response "... ASAP...." That policy also required improvements to be made "... as quickly as possible...," and to correct a "... security vulnerability ..." as "rapidly as possible."

In short, from its United States Headquarters, DS is responsible for post logistical support, as well as all of the technical, mechanical, scientific, security or construction issues related to the operation of existing United States facilities overseas.

Consistent with those responsibilities and instructions the Post in Nairobi relied entirely on Headquarters for physical security and information and guidance on security-related issues. The Post sought information, guidance and approval from DS Headquarters for each and all of the following: a January 1998 security survey, approval of EAP plans, a security fence, a $5200 roll up door, supplies of every kind, including knives, tape and bolts, stairwell repairs, an alarm system, and an FBO supplied contractor, a $750.00 bollard construction task, fire systems, window glazing, various types of commercial equipment, acquisition of metal detectors and scanners, and approval for minor security upgrades.

During the entire period, Headquarters controlled all issues of threat assessment and information dissemination, and all of the pertinent activities of the local guard force ("LGF") stationed at the Nairobi Post.

B. From No Later Than December 1997 Through August 7, 1998, Employees at DS Ignored Their Non-Discretionary Obligations to the Post, and Delayed Fulfilling Those Obligations

Commencing no later than December 1997, Headquarters failed to meet its clear, non-discretionary obligations to the Post employees, and, as a consequence, to Petitioners. The result was the death of hundreds, and the injury of thousands.

On December 24, 1997, Ambassador Bushnell wrote to DOS that the Nairobi Embassy was "extremely vulnerable to a terrorist attack." Post sought a visit by a security assessment team to assess ". . . . how we can lessen our vulnerabilities. . . ." Headquarters took no immediate action.

By February 1998, Headquarters delays caused Post officials to recognize that Ambassador Bushnell ". . . wants to be taken seriously or DS will be on her ____ list."[2] On February 12, Headquarters and Post exchanged cables. Headquarters wrote it would visit to assess and identify security upgrades that can reduce vulnerability at the Chancery. Post wrote that a March "security assessment . . . would be most welcome," and referred to review of the vehicle barrier and perimeter camera surveillance.

---

2. DS vulnerability criteria improperly minimized African posts.

Yet in February, Headquarters grumbled internally about Ambassador Bushnell's requests, writing:

> .... You remember that when this original cable came in Dec it was addressed to both Boswell and A/S AF Rice? The AF bureau would not touch it. That's how it eventually became OP action. We further are not convinced that sending DS/ITA is really needed. It just puts DS in the defensive again.... Also, when you send your new CC cable we would recommend that you include a paragraph on your specific mission which is detailed in Boswell's response: An "assessment" to determine what, if any minor security projects/ upgrades can do to lesson [sic] the Chancery's vulnerabilities; short of a NOB.

Clearly, DS had no desire to fulfill its obligations or to seriously address Ambassador Bushnell's concerns. Rather, a cosmetic "assessment" was scheduled to mollify the Ambassador. A reduced team visited the Post from March 10 through March 13, 1998. The RSO believed, based on Headquarters' own statements, that the visit was designed in part to "... assess physical security upgrades...." Indeed, Ambassador Bushnell thanked Headquarters for the "security assessment," because she was wholly unaware that Headquarters never treated the visit as a "security review."

With the Headquarters team, RSO Hartnett-Kelly toured the Embassy premises, including the rear parking area. At that time, the primitive metal drop bar which guarded the rear garage entrance,[3] could not be secured because of a broken pin or bent arm.[4] The Local Guard Force manned full-time a guard post at the drop bar.

The Headquarters team told RSO Hartnett-Kelly that "he would look into it. He would try to find some help for us." In short, Headquarters reiterated its responsibility for identifying

3. The attack vehicle exploded inside the drop bar. As one report noted: "... the suspect vehicle actually breached the drop gate at Post C-5 and detonated between the drop gate and the grilled swing gate at Post C-4.".

4. This defect existed for one year, but was not reported "... up the chain of command." RSO Hartnett-Kelly was never advised of the defect.

solutions, and, at the same time, dissuaded the RSO from using her initiative. Tragically, that commitment went unfulfilled.

Though DS never issued to Post an end-user report, a report was prepared by the Headquarters team. Accompanied by photographs, the report correctly stated:

> A view of the West garage entrance. Note that Embassy is vulnerable to a heavy truck bomb attack. A truck with a reinforced front could possibly break through the drop-bar, the iron fencing gate, and the rolldown garage door. Also, someone could overpower the guard(s), blow up the drop bar and gate, then drive a car bomb into the garage.

The report reiterated that "... the west parking lot ... represents a car bomb threat. ..."

Yet, in violation of its own guideline, Headquarters never sent the report to Post.

As the undisputed declaration of Petitioner's security expert made clear, simple security upgrades, including improved vehicle barriers, were available.[5] DS was best equipped to advise or inform the RSO about those upgrades. Yet Headquarters failed to meet its duty to Post to provide its promised report and to fulfill its well-recognized obligations of guidance, approval and installation of security upgrades.

Accordingly, on April 24, May 5, and May 18,1998, Post cabled Headquarters, without response, about Post's security concerns. Significantly, the Ambassador, unaided by Headquarters, assumed that Post had "... exhausted post-specific ways of coping with security risks. ..."

Headquarters conducted another visit from June 9 to June 12, 1998. On June 26, 1998, Headquarters warranted that "the Department will also provide post with a trip report. ..."

Again, no report was issued. On July 14, and July 24, 1998, Post reminded Headquarters that Post needed the report.

---

5. As early as 1992, Headquarters was advised that the C-5 gate uses "... a metal, manually operated, drop bar gate to allow access. These are inadequate to arrest a determined ram attempt. While a hydraulic restraint barrier is not required for a medium threat port, a more effective deterrent than the dropbar is necessary."

On August 5, 1998, two days before the attack, Headquarters finally issued a report in the form of a telegram.

The August 5 telegram was critical of local guard contractor UIIS. Among other failures, Headquarters determined that UIIS-employed guards with less than two (2) years experience in security or law enforcement; and the local guards did not have the capacity to effectively operate or be trained in the operation of the technical equipment, such as radios, cameras and long range sound equipment.

The report made no mention of the long-promised discussion of the rear parking area's vulnerability or of response mechanisms, including vehicle barriers, inspections, or bomb recognition training. In its report, under "vehicle barriers," Headquarters wrote "N/A." The report was also silent on the nature or availability of surveillance detection programs.

Barrier standards, set by Headquarters, regard drop bars as only "secondary barriers." By Headquarters' own standards, the rear of the Embassy was inadequately protected by a drop bar. In fact, as Headquarters knew or should have known, that drop bar could not be secured because of a bent pin. This Headquarters technical failure led directly to the success of the bombing attack.

Post-attack reports showed that Headquarters failed to undertake guidance or training with regard to vehicle inspection points. Simple identity card checks, or vehicle inspections, would have deterred the attack. Headquarters knew at the time that "[s]creening vehicles for explosives . . ." is an "important task." Headquarters was responsible for the equipment. However, no such equipment was in place at Post in August 1998. Post-attack reports also concluded that the Chancery had suffered from inadequate perimeter guard equipment, including the absence of alarms, and radios.

In addition, Headquarters had failed to undertake meaningful training in Surveillance Detection ("SD"). Surveillance of a target has preceded every large-scale terrorist attack. Surveillance of the Embassy, in fact, took place on August 3, 1998, and earlier.

Surveillance detection was and is a Headquarters responsibility. The training, operational details, personnel and

equipment were within Headquarters purview. SD training included the local guard forces, and was understood to be outside the scope and ability of the post RSO. Yet Headquarters did not fulfill its specific, technical and non-discretionary duty to apprise Post and its RSO of surveillance detection concepts or procedures.

In sum, Headquarters completely failed to provide to Post the technical or scientific guidance, training or information which it was required to provide on physical security. Its failures were as simple as the failure to fix a pin, mail a report, keep a promise or suggest simple upgrades, and as conventionally-negligent as the failure to train or oversee the local guards, or provide information or warnings.

As a horrible consequence, hundreds died and thousands were injured.

Proceedings Below:

This action was filed by 451 plaintiffs on December 10, 1999.[6] The complaint sought relief through four counts: negligence and inherent danger (Count One); nuisance(Count Two); violation of international law (Count Three); and the imposition of a constructive trust on assets of Usama bin Laden and *al Qaeda* (Count Four).

On August 11, 2000 the United States filed a Motion to Dismiss ("First Motion to Dismiss"), which sought dismissal of Counts One and Two for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and dismissal of Counts Three and Four under Fed. R. Civ. P. 12(b)(6). The United States' jurisdictional arguments were based on 28 U.S.C. § 2680(a) (the "discretionary function exception") and 28 U.S.C. § 2680(k) (the "foreign country exception").

The First Motion to Dismiss was denied without prejudice by Order entered March 26, 2001. On July 16, 2001, Respondent

---

6. Three other actions arising out of the August 7, 1998 embassy bomb blast in Nairobi, Kenya were filed in the trial court: *Odilla Mutaka Mwani, et al v. United States, et al.*, 99CV125; *Isaac Kabengi Ndambiri, et al. v. United States, et al.*, 99CV3086 and *Rosemary Wanjiru Bichage, et al. v. United States*, 00CV1636. *Ndambiri* was dismissed without prejudice by praecipe filed December 10, 1999. *Mwani* included claims against Usama bin Laden and *al Qaeda*. The trial court has declined to find personal jurisdiction over either defendant.

filed a second Motion to Dismiss. By *sua sponte* order filed January 2, 2002, the trial court denied without prejudice the Second Motion to Dismiss, and fixed a new motions schedule. On January 28, 2002, following limited jurisdictional discovery, the United States filed its Third Motion to Dismiss

The trial court issued its Final Order granting that motion on July 30, 2002. App. 16a.

Petitioners noted their appeal to the United States Court of Appeals for the District of Columbia Circuit on August 2, 2002. On July 11, 2003, the judgment of the trial court was affirmed. App. 1a.

REASONS FOR GRANTING THE PETITION

For the reasons set forth below, Petitioners respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

I. The Circuit Court's Expansion of the Discretionary Function Exception In Cases Involving "Security" Is in Principled Conflict With Other Circuits, and Misconstrues the Decisions of this Court in a Case of Substantial Intrinsic, National and International Consequence

A. The Circuit Court's Expansion of the Discretionary Function Exception In Cases Involving Security Conflicts With Other Circuits And Misconstrues the Decisions of this Court

The Circuit Court's application of the discretionary function exception to the FTCA was flawed in two important respects: first, unlike the methodology used in *United States v. Gaubert*, 499 U.S. 315 ,111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988), and their progeny, the Circuit Court declined to analyze individually each of the particular actions challenged by Petitioners. Instead, and erroneously, the Circuit Court adopted the trial court's election to bundle the particular actions into categories, so that the categories, rather than the individual actions, could be tested for elements of protected discretionary judgment; secondly, the Circuit provided, *sub silencio*, a blanket discretionary immunity to any category invoking "security."

Further, even assuming *arguendo* that the Circuit Court's methodology comported with this Court's treatment of the discretionary function exception, five of the Circuit Court's six categories have either been treated by other Circuits as outside the protection of the discretionary function exception, or, on their face, lack any characteristics which have previously been accorded discretionary function protection.

1. The Circuit Court's Methodology Does Not Comport With This Court's Treatment of the Discretionary Function Exception and Creates An Unjustified Analytical Bias Against FTCA Claimants

28 U.S.C. § 2674 provides: The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2680 provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to–
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Four years after the 79th Congress passed the FTCA as part of the 1946 Legislative Reorganization Act, the Supreme Court declared in *Feres v. United States*, 340 U.S. 135, 139-40, 71 S. Ct. 153, 95 L. Ed. 152 (1950) that the FTCA:

> . . . marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit. . . . As the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs – wrongs which would have been actionable if

> inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government. . . .

Similarly, in *Rayonier, Inc. v. United States*, 352 U.S. 315, 319, 77 S. Ct. 374, 1 L. Ed. 2d 354 (1957), the Supreme Court noted that:

> . . . the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.

Moreover, as Judge Holtzoff observed, the exceptions themselves ". . . should be narrowly construed." *McNamara v. United States*, 199 F. Supp. 879, 881 (D.D.C. 1961). Further,

> There is a problem . . . with interpreting the term 'function' too broadly. An overly broad interpretation would lead the discretionary function exception to shield from liability many official actions that violate statutory or regulatory prescriptions or that, though discretionary, are not susceptible to public policy considerations.

Seamon, R.H., Causation And the Discretionary Function Exception To The Federal Tort Claims Act, 30 UC Davis LR 691, at n.243 (1997).

Necessarily, therefore, in construing the discretionary function exception, the court must accord to the waiver an expansive construction, while according a narrow construction to the exception. Following those guideposts, the discretionary function can only be successfully invoked where the challenged conduct involves an element of judgment, and where that judgment is grounded in social, economic or political policy – that is, the exception, properly construed, protects only governmental actions and considerations based on considerations of public policy. *Gaubert, supra*, at 322-23, 1273, *Berkovitz, supra*, at 536-37, 1959.

It is, of course, true that this Court's historical approach to the development of a bright line of demarcation for discretionary function analysis has been occasionally perilous. The Supreme Court's treatment of the exception has not

followed "... a straight line ..." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 811, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984). Various commentators have extended that observation through *Berkovitz* and *Gaubert*. *See Peterson, BA, and Van Der Weide, ME, Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 Notre Dame L.R. 447 (1997), and *see Fishback, DS and Killefer, G The Discretionary Function Exception To The Federal Tort Claims Act: Dalehite*[7] *to Varig to Berkovitz*, 25 Idaho L.R. 291 (1989).

Examination of the nature and the extent of the judgment attendant to each of the particular actions in issue, has, however, been an analytical constant. In *Gaubert*, this Court examined in detail "... seven instances or kinds of objectionable official ..." conduct. *Gaubert, supra*, at 327-31, 1276-78.

Justice Scalia's concurrence in part and concurrence in the judgment clearly described his understanding of the methodology used by the Court. He wrote: "... I write separately because I do not think it necessary to analyze individually each of the particular actions challenged by Gaubert, nor do I think an individualized analysis necessarily leads to the results the Court obtains." *Id.*, at 334, 1280.

Justice Scalia's concurrence was not an invitation to substitute for "item-by-item" analysis, *id.*, at 339, 1282, the bundling and up-labelling mechanism fashioned by the trial court, and affirmed by the Circuit Court, in this case. Instead, Justice Scalia favored an approach unique to the facts in *Gaubert* and only "slightly different" from individualized analysis. *Id.*, at 338, 1282. Noting that federal officials only recommended the challenged actions, under threat of bank seizure, he concluded that the government conduct to be tested was the seizure and the operation of a bank, and that the recommendations were the announced guidelines pursuant to which the government would exercise its discretionary function.

---

7. *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) was this Court's first review of the exception. *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955), and *Rayonier, supra*, did not directly address the exception. *Varig, Berkovitz* and *Gaubert* followed.

No similar detour was available to, or pursued by, the trial court or the Circuit Court in the case at bar, nor this Court in the cases which paved the way for *Gaubert*. Instead, as in *Gaubert*, the Court conducted an individualized analysis.

In *Dalehite, supra*, this Court analyzed in detail "four specific acts of manufacture" of a fertilizer which exploded in shipment, *Dalehite, supra*, at 39, 969, including "bagging temperature," "bagging type," labeling and coating, and concluded that each was "the product of an exercise of judgment, requiring consideration of a vast spectrum of factors. . . ." *Id.*, at 40, 970.

In *Indian Towing*, the government conceded the inapplicability of the discretionary function exception to the

> specific acts of negligence relied on . . . (:) failure to check the battery and sun relay system which (lighthouse) light; the failure . . . to make a proper examination of the connections . . . ; the failure to check the light between September 7 and October 1 . . . ; and the failure to repair the light or give warning that the light was not operating.

Id., at 62, 123. Moreover, the Court rejected as unworkable an "end-objective" governmental activity test, *id.*, at 67, 125, readily-comparable to the Circuit Court's bundling methodology in this case, and underscored the distinctions between the protected decision to undertake a lighthouse service in the first place, and the actionable due care applicable to the light's maintenance, and the failure to warn that it was not functioning.

In *Varig*, this Court analyzed in detail the FAA's system of aircraft compliance review and spot-checking before concluding that the administratively-designed system was the product of the plainest of discretionary functions: "the Government acting in its role as regulator." *Varig, supra*, at 814, 2764.

Finally, in *Berkovitz* this Court, as in *Varig* ". . . focusing . . . on the particular nature of the regulatory conduct at issue," *Berkovitz, supra*, at 539, 1960, remanded to determine whether "officials appropriately exercise policy judgment in determining that a vaccine product complies with the relevant

safety standards," *id.*, at 545, 1963, notwithstanding that the criteria themselves were immune.

Pursuant to § 2674, and in conformity with the individualized detail evident in *Gaubert*, *Berkovitz*, *Varig*, *Indian Towing*, and *Dalehiete*, the Petitioners provided uncontroverted evidence of 21 discrete failures by Headquarters and its contractor. Those actionable failures included the painfully-mundane: for example, the failure to fix or replace a broken pin in the outdated drop-bar; the failure to keep a simple promise to the RSO to check for alternatives; the purposeless mischaracterization of the nature of a post visit; the failure to send a report to the post; the failure to timely send a second report to the post; and the failure to correct the post's misimpression that it had exhausted all available remedies. As well, the record below established actionable failures in information delivery, training and supervision. The uncontroverted declaration of petitioners' security expert was unequivocal:

> 16. . . . DS and UIIS failed to meet the standard of care applicable to the provision of security to the Embassy. ...[T]hose failures . . . took place . . . at a non-discretionary level. . . .
>
> 18. At the Embassy, several physical security deficiencies led to the decision to attack the Embassy, and the success of that attack. For example:
>
> (a) a broken and primitive drop-bar provided no deterrence in front of the metal gate at the top of the ramp in the rear parking lot.
>
> (b) no impediments were in place at the exit ramp to the rear parking lot.
>
> (c) no effective vehicle barriers were in place at the rear parking lot.
>
> (d) the rear parking lot was a "soft" target which invited attack. It offered no deterrence.
>
> (e) no effective local guard presence was available or visible at the rear parking lot.
>
> (f) . . . the local guards stationed at the rear parking lot on the day of the attack were untrained and inexperienced. . . .

(g) DS headquarters personnel never advised the RSO or ARSO of the availability or the existence of surveillance detection programs.

(h) The GEMS system was not delivered, or replaced. . . .

28. Several simple, low-cost solutions were available.

29. . . . [N]o response was transmitted to the Embassy even though the physical security enhancements information was readily available to DS headquarters personnel and its transmission would have been a simple matter.

31. DS headquarters personnel repeated these failures through August 1998. Their delay in the transmission of the report for the June 1998 inspection was in my opinion likely the result only of bureaucratic or administrative neglect or negligence. Timely transmission of that report would have alerted the Embassy to the significant deficiencies in the local guard force. The report also carelessly failed to include the promised response with regard to the rear parking lot.

32. The failures which allowed the attack to be successful were the result of bureaucratic failures by DS headquarters personnel. . . .

The Circuit Court, however, did not analyze individually each of the particular actions challenged by Petitioners. Instead, as the Circuit Court wrote:

> The district court helpfully distilled these allegations into six categories: 1) a failure to provide guidance and advice on improving security at the Embassy, 2) a failure to provide security equipment to the Embassy, 3) a failure to train adequately Embassy personnel and contractors to deal with various security threats, 4) a failure to warn adequately Embassy personnel, and others, of potential terrorist threats, 5) an improper classification of the level of security risk at the Embassy, or 6) falsely leading Embassy

> personnel to believe that security analyses had been conducted or would be conducted. . . . The district court concluded that all six categories were barred by the second step of the discretionary function test . . . As the district court explained, "[d]ecisions regarding how much safety equipment should be provided to a particular embassy, how much training should be given to guards and embassy employees, and the amount of security-related guidance that should be provided necessarily entails balancing competing demands for funds and resources." . . . "Each individual embassy's need for security," the district court noted: must be balanced against the need perceived at other embassies, and the need for security must be balanced against the need for alternative projects that could consume scarce resources. Moreover, each of Defendant's decisions regarding security involved balancing potential inconvenience to State Department employees against the perceived security gains that would result from a safety measure. (Internal citations omitted). At 66.

The Circuit Court adopted the trial court's categorizations, as well as its conclusion that "all six *categories* were barred by the second step[8] of the discretionary function test. (emphasis added)" *Id.*, at 67. By bundling individually asserted acts of garden variety negligence, so that those individual acts could be uplabelled in broader terms necessarily more conducive to a finding or conclusion of discretionary judgment, the Circuit Court abandoned this Court's 50-year-long approach to discretionary function analysis, and, in so doing, ensured the unwarranted restriction of FTCA claims.

One need not strain to design or conjure a discretion-imbued category into which lighthouse repair could have been eased in *Indian Towing*, or into which safety standards compliance for a vaccine product could have been consigned

---

8. The first step, the existence of a mandatory directive precluding discretion, *Gaubert*, *supra*, at 322, 1273, is not the subject of this Petition.

in *Berkovitz*. Bundling and up-labelling of the sort used by the Circuit Court would have eliminated the need for any of the exhaustive and individualized analysis undertaken by the *Dalehite*, *Varig* and *Gaubert* courts.

The item-by-item approach is not an outmoded methodology filling an analytical vacuum until a simpler, easier method of resolving issues with a thorny history could be devised. It is fundamental to the ability of an FTCA claimant to test whether any judgment in issue " is of the kind that the discretionary function was designed to shield." *Gaubert*, at 322-23, 1273.

"... [T]he question of what 'really' caused the plaintiff's injuries for purposes of applying the discretionary function exception is a potentially dispositive threshold issue.... First, a court must ask upon what conduct the claim is based...." *Seamon, supra*, at 695-96, 701-02. The nature and the extent of the judgment attendant to that conduct is readily-susceptible to judicial exploration, and application to the standards enunciated in *Berkovitz* and *Gaubert*. There is no reason for the injection into that process of an artificial bundling and uplabelling stage which would be contentious, penultimately pedantic, and, ultimately, exclusionary of claims arising out of particular acts of garden variety negligence which, by their own nature, warrant relief under the FTCA.

2. The Circuit Court's Blanket Immunization of Conduct Invoking "Security" Exceeds the Language of the Statute

In the two paragraphs which are the heart of the Circuit Court's disposition of the discretionary function, the Circuit Court uses the word "security" nine times. Though the Circuit Court opinion contains no simple, direct language carving from the FTCA all security-related actions and decisions, the subtlety of the opinion is insufficient reason to forestall review of a construction which could lead to significant erosion of the statute itself.

This Court has not had occasion to consider whether the government's security-related activities should be accorded uniquely-comprehensive protection from civil liability under the FTCA. Faced, however, with government conduct in arenas

which, at the time, carried with them the same seriousness, the Court never contemplated the propriety of a blanket immunity untethered to the discretionary function formulations with which it has wrestled since the passage of the statute. The reliability of vaccines in 1988, *see Berkovitz, supra*, the safety of aircraft in 1984, *see Varig, supra*, the reliability of public works such as lighthouses in 1955, *see Indian Towing, supra*, and the transportation of inherently dangerous material in 1953, *see Dalehite, supra*, could undoubtedly have produced champions of their place at the pinnacle of government responsibility and public concern. Indeed, commentators have declined to propose exceptional protections to all matters related to national defense. "The statutory mission of the Department of Defense may be to protect the nation's security, but not every action of every Defense Department employee is taken with that goal in mind." *Peterson, BA*, and *Van Der Weide, supra*, at 3-4. This Court should, therefore, guard against jurisdictional erosions threatened by serious, imminent but necessarily transitory challenges to the national well-being, not merely because the interests of the injured would be circumscribed, but because, over the longer term, the national well-being is advanced by judicial scrutiny of such government failures.

The dissent of Justices Jackson, Black and Frankfurter to the now-long-abandoned formulations of *Dalehite, supra*, has fundamental application to this Court's choice of direction:

> This is one of those cases that a judge is likely to leave by the same door through which he enters. As we have been told by a master of our craft, 'Some theory of liability, some philosophy of the end to be served by tightening or enlarging the circle of rights and remedies, is at the root of any decision in novel situations when analogies are equivocal and precedents are silent.' . . .
>
> Until recently, the influence of the Federal Government has been exerted in the field of tort law to tighten liability and liberalize remedies. . . . But, when the Government is brought into court as a tort defendant, the very proper zeal of its

> lawyers to win their case and the less commendable zeal of officials involved to conceal or minimize their carelessness militate against this trend. The Government, as a defendant, can exert an unctuous persuasiveness because it can clothe official carelessness with a public interest. Hence, one of the unanticipated consequences of the Tort Claims Act has been to throw the weight of government influence on the side of lax standards of care in the negligence cases which it defends. At 49-50, 975.

Immunization of security-related decisions and conduct will, eventually, and tragically, produce the same consequences. A statute that was designed "to establish novel and unprecedented governmental liability," *Rayonier, supra,* at 319, should not instead be constrained by novel and, at least since the passage of the FTCA, unprecedented governmental immunity.

3. The Circuit Court's Categories Have Either Been Treated By other Circuits As Outside the Protection of the Discretionary Function Exception Or They Lack Any Characteristics Which Have Previously Been Accorded Discretionary Function Protection

Even assuming *arguendo* that the applicability of the discretionary function is determined by analyzing the nature and the extent of the judgment attendant to the six categorizations adopted by the Circuit Court, rather than the individual allegations, the Circuit Court's disposition of those categorizations conflicts with treatment accorded similar allegations[9] in other Circuits or, in one instance, lacks any characteristics which have previously been accorded discretionary function protection.

Failure to provide guidance and advice on improving security at the Embassy

Headquarters claims, such as the claims in this case, "... typically involve *allegations of negligent guidance* in an office

---

9. Petitioners do not address in this Petition the Circuit Court's "improper classification of the level of security risk at the Embassy" category.

within the United States of employees who cause damage while in a foreign country, or of activities which took place within a foreign country" (emphasis added). *Nurse v. United States*, 229 F.3d 996 (9th Cir. 2000).

Failure to provide security equipment to the Embassy

In *Marlys Bear Medicine v. United States*, 241 F.3d 1208, 1213 (9th Cir. 2001) reversing entry of summary judgment in favor of the United States in a case arising out of government negligence in supervision and management of safety aspects of a private logging operation, the Court wrote:

> [A]ctions based on technical or scientific standards are not the kind of judgments meant to be protected from liability by the discretionary function exception.
>
> . . .
>
> A failure to effectuate policy choices already made will not be protected under the discretionary function exception.
>
> . . .
>
> Once the government has undertaken responsibility for the safety of a project, the execution of that responsibility is not subject to the discretionary function exception.
>
> . . .
>
> A failure to adhere to accepted professional standards is not 'susceptible to policy analysis'. . . .
>
> . . .
>
> [F]ailure to require safety measures or training was not a policy judgment that Congress intended to protect from FTCA liability." At 1215-1217

Failure to train adequately Embassy personnel and contractors to deal with various security threats

In *Couzado v. United States*, 105 F.3d 1389, 1395-96 (11th Cir. 1997) the Eleventh Circuit, upholding a determination that the foreign country exception did not apply, ruled: "The plaintiffs urge that a 'headquarters' claim exception exists in §2680(k) jurisprudence . . . This claim is achieved on proof that a *negligent failure to warn, instruct or train* occurred in the United States (emphasis added)." And *see Marlys, supra.*

Failure to warn adequately Embassy personnel, and others, of potential terrorist threats

The discretionary function exception does not eviscerate the government's obligation to warn, or disclose to, the public, particularly where the safety of others is involved. *See Summers v. United States*, 905 F.2d 1212, 1215 (9th Cir. 1990), and *see ARA Leisure Services v. United States*, 831 F.2d 193, 195 (9th Cir. 1987). The discretionary function exception is not and has never been regarded as an absolute bar to claims based on the failure to warn or disclose. *See* Shafer, RP, *Liability Of The United States For Failure To Warn Of Danger Or Hazard Resulting From Government Act Or Omission As Affected By "Discretionary Function Or Duty" Exception To Federal Tort Claims Act 28 U.S.C.A. § 2680(a), 65 ALR Fed. 358.*

While complicated by each Court's pre-*Gaubert* insistence on proof of actual, rather than hypothetical, policy consideration, the Second Circuit in *Andrulonis v. United States*, 924 F.2d 1210 (2d Cir. 1991), *vacated*, 502 U.S. 801 (1991), previous decision reinstated, 952 F.2d 652 (2d Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992) and the First Circuit in *Dube v. Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989) imposed clear duty to warn of hazardous conditions. And *see Cestonaro v. United States*, 211 F.3d 749 (3d Cir. 2000).

Falsely leading Embassy personnel to believe that security analyses had been conducted or would be conducted.

Headquarters' persistent failure to communicate accurately with its colleagues at Post – either with regard to mischaracterizing the purpose of its inspections, promising assistance that never arrived, the immediacy in Nairobi of the bin Laden threat or the inadequacies of the local guards or their management[10] – lacks any characteristics which have previously been accorded discretionary function protection. Though there does not appear to be a Circuit Court opinion addressing the social, economic or political considerations

10. The United States had obtained a sealed indictment against Bin Laden on June 8, 1998. The indictment was obtained on the basis of information obtained from Bin Laden's Nairobi cell.

Moreover, prior to the attack, both the Department of Labor and the Department of Justice were familiar with significant misconduct in the United States by the security contractor at the Embassy.

which inform a government employee's conscious election to dissemble, or his failure to accurately convey important information, to colleagues who rely on the information, the unexplained adoption by the Circuit Court of a disposition which protects the government from the consequences to others of that misconduct must attract review in order to avoid confusion about the acceptability of those practices.

B. The Disposition of the Claims In This Case Is of Substantial Intrinsic, National and International Consequence

The intrinsic consequence of the Circuit Court's decision – that is, the impact of the decision to bar from judicial remedies hundreds of Kenyan families who suffered the death of a family member, and thousands of Kenyans who were injured – should be free from contravention. The national consequence, both in the concomitant immunization of the United States from the claims in this case, and the narrowing of avenues of relief for future claimants under the FTCA, as is discussed in the preceding subsection, is equally undeniable.

It is, however, in the international arena that the impact of the Circuit Court's exclusion of Petitioners' claims will reverberate. Called by many in Kenya the "law suit of the century," *see, e.g., The (Kenyan) Lawyer* (April 1999), and the subject of numerous media reports in East Africa and in Europe over its duration, the pendency of the claim in an American court was an antidote to the observation in 1999 by one East African newspaper that "Kenyans were amazed at the callous disregard for Kenyan lives by American officials."

The import of the 1998 attack on American international concerns has not faded. Only two days ago, the Washington Post described comments by President Bush at a state dinner as follows:

> Today, we stand together against the forces of terror and in the defense of human dignity, Bush said in his toast. "We both understand the danger and cost of terrorism. It has brought damage to both our economies and grief to both our nations."
>
> Kenya was the site of the 1998 attack on the U.S. Embassy in Nairobi, and the bombing last November of an Israeli-owned hotel in Mombassa.

On August 7, 2002, Walter Kansteiner, DOS Assistant Secretary for African Affairs, released the following statement:

> I hope that, as the 9/11 anniversary draws closer, we will remember another date that will live in infamy: August 7, 1998. The men, women and children – Americans, Kenyans and Tanzanians –who were murdered or injured that day were among the first casualties in the Global War on Terrorism. . . .
>
> Al-Qaida destroyed two embassies 4 years ago, but they did not destroy the ties that bind the American, Kenyan and Tanzanian people together. In fact, they strengthened them. . . . The United States soon will open new embassy buildings in Dar es Salaam and Nairobi. Those buildings will serve as tangible symbols that the comradeship the bombings forged between the American, Kenyan and Tanzanian peoples will never be allowed to wane.

Grant of the Petition would be consistent with American expressions of our recognition of the gravity of the harm inflicted on our Kenyan friends and allies during the crossfire in our War on Terrorism, and of our willingness to address, in our most elevated venue, any responsibility we may have for the deep losses they sustained.

II. The Circuit Court's Misapplication of the Foreign Country Exception Is in Principled Conflict With Other Circuits, and Misconstrues the Law In a Case of Substantial Intrinsic, National and International Consequence

Local guard programs serve as a substitute for insufficiencies in host country protection. Since 1995, they have been managed by DS. UIIS was the contractor hired by Respondent to provide local guard services at the Nairobi Embassy. Petitioners alleged that UIIS was negligent both in the months leading up to the attack, and during the attack.

Respondent is generally liable for the negligence of its contractors unless the independent contractor exception

applies. *See* 28 U.S.C. § 2671, and *see Logue v. United States*, 412 U.S. 521, 93 S. Ct. 2215, 37 L. Ed. 2d 121 (1973) and *United States v. Orleans*, 425 U.S. 807, 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976).

The Circuit Court addressed LGP claims as follows:

> To be sure, appellants presented evidence that supervision of the UIIS contract amounted to a "full time job for one [Assistant Regional Security Officer]." . . . Although this may well constitute the sort of day-to-day supervision falling outside the independent contractor exception, Assistant Regional Security Officers are located overseas – in this case, in Nairobi – and the FTCA's sovereign immunity waiver does not extend to acts or omissions arising in territory subject to the sovereign authority of another nation. *See 28 U.S.C. § 2680(k); see also United States v. Spelar, 338 U.S. 217, 221, 70 S.Ct. 10, 12, 94 L.Ed. 3 (1949)* (purpose of foreign country exception is to avoid having another country's law define the scope of the federal government's tort liability). Moreover, to the extent that appellants allege negligent supervision of local guards by State Department employees located in the United States, those allegations are, for the reasons given above, barred by the discretionary function exception.[11]

The Circuit Court, however, made no attempt to address "headquarters claims", explicitly recognized by the Ninth, Eleventh and District of Columbia Circuits." *See Leaf v. United States*, 588 F.2d 733 (9th Cir. 1978), *Couzado, supra*, and *Nurse, supra*, and *see Beattie v. United States*, 244 U.S. App. D.C. 70, 756 F.2d 91 (1984). Indeed, then – Judge Scalia acknowledged that "few such (headquarters) suits will be able to be dismissed at the jurisdictional threshold." *Beattie, supra*, at 119.

> The allowance of headquarters claims should . . . be broadened, rather than narrowed. . . . Courts should thus give claimants a great deal of leeway in presenting their cases. . . ."

---

11. Petitioners' adopt herein their discretionary function response in Section I.

Comment, *Away From Justice And Fairness: The Foreign Country Exception To The Federal Tort Claims Act*, 22 Loy. L.A. L.R. 603, 631 (Spring 1989).

The record before the court was more than adequate to trigger application of a headquarters claim analysis.

Headquarters developed the LGP operating manual, provided training to RSOs regarding local guard contracts, approved and provided LGP equipment, and, most significantly, developed and provided LGF training. In addition, Headquarters designed the template for all LGF contracts, forms and reviews, and including the contract at issue in this case. Headquarters developed the General Orders which defined LGF performance, as well as the statement of work, the deduction schedule, and United States and contractor furnished equipment requirements.

Headquarters, which instructed posts to refrain from making their own constructive changes to LGF contracts, demanded that the Nairobi Post keep Headquarters informed of the LGF contract, directly addressed the effect of the contractor's threat of bankruptcy, and regularly reviewed the contractor's performance under the contract. The LGF bridge contract was signed in Washington .

Headquarters revised RSO draft correspondence regarding performance under the LGF in Nairobi, maintained and updated an LGF database handled all payments under the contract, and settled a certified claim by the contractor. Consistent with Headquarters requirements that all LGF questions be directed to Headquarters, Post regularly sought guidance from Headquarters on its LGF contract.

In short, Headquarters provided the training, guidance, management and oversight which should have led to review of a headquarters claim as it related to the negligence of the local guards. The Circuit Court's failure to do so places it squarely in conflict with other Circuits.

Even assuming *arguendo* that Headquarters had no responsibility for the local guards, application of the foreign country exception should have been precluded by the periodic presence in the United States during the time period in issue of the RSO's.

RSO Hartnett-Kelly conceded her likely presence in the United States during that period. RSOs attended conferences conducted in the United States. Both the ARSO and Ambassador Bushnell were in the United States during Hartnett-Kelly's tenure.

Respondent conceded that RSOs are considered on duty 24 hours a day. As Petitioner's expert stated in his declaration: "This status is accorded to all Federal investigators who are part of the job series to which RSO Hartnett-Kelly was assigned. Special agents are subject to assignment to any location at any time, and because of this status they receive special law enforcement incentive pay."

Accordingly, training or supervisory omissions by Post employees continued even during their presence in the United States. The Circuit Court, however, did not address that issue.

Neither the language nor the purpose of the foreign country exception supports the conclusion reached by the Circuit Court. Congress' concern – to avoid having another country's law define the scope of the federal government's tort liability – would have been addressed by the simplest and least controversial of decisions – the application of District of Columbia law by the District of Columbia trial court.

To avoid confusion in the application of headquarters claims, therefore, this Court should grant the Petition.[12]

III. The Circuit Court's Residuary Affirmance of the Trial Court's Erroneous Construction of the Principles of "Prolonged Detention" and "Systematic Discrimination" Under Fed. R. Civ. P 12(b)(6) Is in Principled Conflict With Other Circuits, and Misconstrues the Decisions of this Court In a Case of Substantial Intrinsic, National and International Consequence

The Circuit Court's residuary embrace, without additional comment, App. 4a, of the trial court's disposition of Petitioners' Count Three claims of violation of international law, App. 43a, is in principled conflict with the construction by other circuits of claims of "prolonged detention," and "systematic

12. Petitioners adopt from the previous section the international significance of the Circuit Court's disposition of the LGP negligence claims.

discrimination," and misconstrues this Court's treatment of "prolonged detention" claims.

Petitioners alleged that the United States prevented Kenyan rescue operations; and, discriminated against the injured Kenyans by directing limited medical resources to Americans, while depriving Kenyans of those resources. Stated otherwise, Petitioners sought relief because the United States consciously imprisoned, and subjected to inhumane treatment, the injured Kenyans, solely on the basis of their nationality and race.

The International Convention on Civil and Political Rights ("ICCPR"), App. 56a, ratified 138 Cong. Rec. S4781-84 (Apr. 2, 1992), precludes "prolonged arbitrary detention" and "systematic racial discrimination." *See* Restatement (3d) of Foreign Relations Law § 702(e), and *see Princz v. Federal Republic of Germany*, 26 F.3d 1116, 1174 (D.C. Cir. 1974), and *see Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001). *See* also *Committee of US Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988).

"In contemporary international law, broadly ratified multilateral treaties are more likely than a series of bilateral treaties to generate the argument that treaty rules have become customary law. . . ." Steiner, HJ and Alston, P. *International Human Rights In Context* (Clarendon Press, Oxford 1996) at p.38. And *see* Restatement (3d) of the Foreign Relations Law of the United States § 102 (1986).

"Cases arising under international law or international agreements of the United States are within the Judicial Power of the United States and, subject to constitutional and statutory limitations and requirements of justiciability, are within the jurisdiction of the federal courts." Restatement (3d) of Foreign Relations Law of the United States § 111 (1986). "Federal courts jurisdiction over cases involving international law is clear." *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980), and *see* Charles A. Wright, *et al.*, 13B Federal Practice and Procedure § 3585 at nn. 6-13 and accompanying text (1988 ed.) (customary international law is a part of federal common law for purposes of federal question jurisdiction).

Neither the trial court, nor, as a consequence, the Circuit Court, appears to have disputed the jurisdiction of the trial court over the customary international law claims, as those customs are defined by the ICCPR. Rather, the trial court concluded, under Fed. R. Civ. P. 12(b)(6), that Petitioners failed to allege facts sufficient to satisfy the terms "prolonged," "arbitrary," or "systematic." App. 44a. That determination incorrectly construes decisions of this Court, and conflicts in principle with decisions of other Circuit Courts.

A. The Circuit Court's Disposition of the Claims of "Prolonged Detention" Misconstrues This Court's Treatment of that Issue In Principles and Conflicts With Decisions In Other Circuits

"Prolonged detention" has been applied to a 16 hour detention, *United States v. Montoya de Hernandez*, 473 U.S. 531, 545, 105 S. Ct. 3304, 3312 (1985) (Stevens, concurring), and to an unusual traffic stop. *Pennsylvania v. Bruder*, 488 U.S. 9, 11, 109 S. Ct. 205, 206 (1988). And *see Alvarez-Machain v. United States*, 266 F.3d 1045, 1053 (9th Cir. 2001) (emphasizing effect on victim, not duration, ruled that detention of under 24 hours was arbitrary and violated the law of nations). There is, thus, no support for the trial court's determination that the complaint failed to satisfy the lenient pleading standard of 12(b)(6).

Clearly, that decision both misconstrued in principle this Court's treatment of the issue, and conflicted with decisions from other circuits.

B. Assertions of "Prolonged Detention" Are Recurring And Important Issues in Current Federal Litigation[13]

The impact of the District of Columbia's erroneous decision extends well beyond its effect on Petitioners. Imprecise judicial construction of the meaning of "prolonged detention" threatens confusion in both civil and criminal contexts which are the subject of repeated and contemporaneous federal litigation.

In *Cherrington v. Skeeter*, 2003 WL 22187734 (6th Cir. 2003), the Sixth Circuit reversed grant of summary judgment against

13. The intrinsic and international impact of the Circuit Court's decision, as discussed in the preceding sections, is equally applicable to the international law-based claims.

a plaintiff's Fourth Amendment 42 U.S.C. § 1983 claim of prolonged detention. And *see United States v. Vite Espinoza*, 342 F.3d 462, 473 (6th Cir. 2003) (discussing effect of "prolonged detention" during search, and observing that the court must assess "the scope and the nature of the restraints," and not merely "the length of the detention").

Similarly, in *Williams v. Kaufman County*, 2003 WL 21962582 (5th Cir. 2003), the Fifth Circuit concluded that a three-hour detention was prolonged and illegal, though subject to qualified immunity. And *see United States v. Brigham*, 343 F.3d 490 (5th Cir. 2003) (18 minute detention during traffic stop was prolonged and illegal).

Indeed, the Third Circuit, in *Pikel v. Garrett*, 55 Fed. Appx. 29 (3d Cir 2002) (unpublished) noted the "relative uncertainty in the law" in a § 1983 claim based on the prolonged three-and-a-half hour detention of employees during a search of business premises. At 32.

The instant petition should be granted in order to forestall confusion among the Circuits and to clarify, establish or reject the imposition of minimal durations for claims of prolonged detention.

C. The Circuit Court's Disposition of the Claims of "Systematic Discrimination" Conflicts With Decisions In Other Circuits

"Systematic discrimination" is a ". . . pattern or practice which results in discrimination." *Huguley v. General Motors Corp.*, 52 F.3d. 1364, 1370 (6th Cir. 1995). "The talk in some cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure from a norm must be rooted in design and not derive merely from error or fallible judgment." *Batra v. Board of Regents of University of University of Nebraska*, 79 F.3d 717, 721 (8th Cir. 1996). Thus, as the Eighth Circuit makes clear, and contrary to the *sub silencio* determination of the District of Columbia Circuit, the fact that the complaint alleges systematic discrimination in the course of a single event cannot be dispositive as a matter of law of the sufficiency of the complaint. Rather, the court must look to the existence of a "design" at the root of the discrimination. Because the

complaint alleged intent, the dismissal of Petitioner's international law claims conflicted in principle with the Eighth Circuit's treatment of systematic discrimination claims.

D. Assertions of "Systematic Discrimination" Are Recurring And Important Issues in Current Federal Litigation

Imprecise judicial construction of the meaning of "systematic discrimination" threatens confusion in civil and criminal contexts which are the subject of repeated and contemporaneous federal litigation. Claims of "systematic discrimination" regularly arise in the course of the resolution of a variety of issues in federal litigation, *see Desi's Pizza Inc. v. City of Wilkes-Barre*, 321 F.3d 411 (3d Cir. 2003) (whether systematic discrimination in law enforcement violates the Equal Protection Clause), *McKay v. United States Department of Transportation*, 340 F.3d 695 (8th Cir. 2003) (age discrimination in employment), and *United States v. Marino*, 277 F.3d 11 (1st Cir. 2003) (whether criminal defendant met threshold requirement of systematic discrimination for *Batson* challenge).

The instant petition should be granted in order to forestall confusion among the Circuits and to clarify, establish or reject the imposition of minimal scope or duration requirements for claims of systematic discrimination.

CONCLUSION

On the basis of the foregoing, a writ of certiorari should issue to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

PHILIP M. MUSOLINO
MUSOLINO & DESSEL
1615 L Street, N.W.
Suite 440
Washington, D.C. 20036
(202) 466-3883

Counsel for Petitioners